

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

NICK POURZAL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 2001-140
	)	
MARRIOTT INTERNATIONAL, INC.,	)	
CAPITAL HOTEL MANAGEMENT, LLC and	)	
BLACKACRE CAPITAL MANAGEMENT, LLC,	)	
	)	
Defendants.	)	
_____	)	

MARRIOTT INTERNATIONAL, INC.,	)
	)
Defendant/	)
Third-Party Plaintiff,	)
	)
v.	)
	)
Prime Hospitality Corp.,	)
	)
Third-Party Defendant.	)
_____	)

ATTORNEYS:

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*For the defendant Blackacre Capital Management*

**Bennet Chan, Esq.**

*For the defendant Capital Hotel Management, LLC*

**Maria Tankenson Hodge, Esq.**

*For the third-party defendant Prime Hospitality Corp.*

## **MEMORANDUM OPINION**

**GÓMEZ, Chief J.**

Before the Court is the motion of the third-party defendant Prime Hospitality Corporation ("Prime"), to dismiss the complaint of the third-party plaintiff, Marriott International, Incorporated ("Marriott").

### **I. FACTS**

From 1985 to 1999, Prime owned and operated the Frenchman's Reef Beach Resort on St. Thomas (the "Reef").<sup>1</sup> During that time, Nick Pourzal ("Pourzal") was employed as the General Manager and Chief Operating Officer of the Reef. The terms of Pourzal's employment were included in an employment agreement ("Employment Agreement").

In September 1998, Prime and Marriott began negotiating the sale of the Reef. On August 8, 1999, Prime terminated Pourzal's employment with the Reef.

In an agreement dated September 15, 1999 (the "Sale Agreement"), Prime agreed to sell the Reef to Marriott. The Sale Agreement included three indemnification clauses, two of which

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<sup>1</sup> A review of the facts of this case can be found in this Court's 2004 decision on this matter. See *Pourzal v. Marriott Int'l, Inc.*, 305 F. Supp. 2d 544 (D.V.I. 2004).

pertain to the present matter.

First, Prime obligated itself to indemnify and defend  
Marriott:

[A]gainst, and in respect of any and all claims, demands, losses, costs, expenses, injuries, liabilities, obligations or damages which may be asserted against, incurred or suffered by [Marriott] caused by or arising out of [Prime's] ownership and/or operation of the [Reef] prior to the date of Closing, including losses caused by liability to third parties for personal injuries.

(Compl. ¶ 11.) A second clause in the Sale Agreement specifically related to claims Pourzal might make against Marriott, and indemnified Marriot:

[A]gainst and in respect to any claims, demands, losses, costs, expenses, injuries, liabilities, obligations or damages which may be asserted against, incurred or suffered by [Marriott] or the [Reef], which relate to any rights, title, interest or other claims, of any type or nature (including any right, title or interest or other claim relating to the [Reef]) by Nick Pourzal and/or his spouse . . . to the extent and only to the extent, such Pourzal's Claims relate to conditions, facts or events alleged or existing prior to the date of Closing and arise from acts or omissions by [Prime] or any predecessor in interest to [Prime] or the [Reef].

(*Id.* at ¶ 12) The sale was finalized on March 15, 2000.

On August 7, 2001, Pourzal filed a complaint against Marriott. In a February, 2004, decision, this Court dismissed two of Pourzal's original claims and allowed him leave to re-file his complaint. *Pourzal v. Marriott Int'l, Inc.*, 305 F. Supp. 2d 544, 548 (D.V.I. 2004). On May 26, 2004, Pourzal amended his

original complaint and added two new defendants.<sup>2</sup> In his eight-count complaint, Pourzal alleges that Marriott tortiously interfered with the Employment Agreement and other contracts (Counts I and II); that Marriott, CHM, and BCM trespassed on Pourzal's properties (Count III); were unjustly enriched by the trespass (Count IV); breached lease agreements (Counts V and VI), and made intentional and negligent misrepresentations regarding the lease agreements (Counts VII and VIII).

On June 1, 2004, Marriott filed a third-party complaint (the "Complaint") against Prime. The Complaint alleges that the Sale Agreement obligated Prime to indemnify and defend Marriott against Pourzal's complaint, and that it did not do so. Prime moved to dismiss the third party complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

Prime argues that Marriott has failed to state a claim for defense or indemnity against Pourzal's complaint because either the acts providing the basis for the claims Pourzal makes against Marriott took place after the period for which Prime was obligated to indemnify and defend Marriott, or the allegedly tortious activity resulted from Marriott's intentional acts, for which Prime owes no duty to indemnify or defend. Alternatively,

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<sup>2</sup> On September 2, 2004, Pourzal filed a third amended complaint, which corrected a mistake in defendants' names. On March 18, 2005, this Court granted a motion by Pourzal for leave to file this complaint.

Prime argues that requiring it to indemnify Marriott against an intentional tort claim would violate public policy.

## II. DISCUSSION

In considering a Rule 12(b)(6) motion, all material allegations in the Complaint are taken as admitted, and the Court must construe all facts in a light most favorable to the non-moving party. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). All reasonable inferences are drawn in favor of the non-moving party. *Alston v. Parker*, 363 F.3d 229, 223 (3d Cir. 2004). The Complaint should not be dismissed unless the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 810 (1993) (citing *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957)).

"The duty to defend comes into play when a claim is made against an insured which may potentially be covered by the policy." *Hess Oil V.I. Corp. v. Firemen's Fund Ins. Co.*, 626 F. Supp. 882, 885 (D.V.I. 1986). The indemnity clause in the Sale Agreement expressly requires Prime to defend Marriott against "all claims . . . caused by or arising out of [Prime's] ownership and/or operation of the [Reef] prior to the date of Closing." (Compl. ¶ 12.) "[C]ourts have taken a strong stand against holding insurers liable for the defense costs of claims

their policies do not cover, even when those claims are joined with covered claims." *Enron Corp. v. Lawyers Title Ins. Corp.*, 940 F.2d 307, 311 (8th Cir. 1991) (applying Virgin Islands law) (citing *EEOC v. S. Publishing Co.*, 894 F.2d 785, 791 (5th Cir. 1990); *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1224 (6th Cir. 1980)); *Okada v. MGIC Indem. Corp.*, 823 F.2d 276, 282 (9th Cir. 1986); *Harborside Refrigerated Svcs., Inc. v. IARW Ins. Co.*, 759 F.2d 829, 831 (11th Cir. 1985)).

### III. ANALYSIS

To state a claim for indemnity or defense, a party must allege that a valid indemnity agreement exists, and that the conduct for which indemnity is sought falls within the terms of the indemnity agreement. *In re Tutu Water Wells Contamination Litig.*, 32 F. Supp. 2d 795, 798 (D.V.I. 1998). Marriott alleges that it entered into an agreement with Prime to purchase the Reef from Prime, and that the agreement contains an indemnity clause. Thus, this Court must look to the factual allegations in Pourzal's complaint to determine whether the conduct for which indemnity is sought is covered by the indemnity agreement. See *C.H. Heist Caribe Corp. v. Am. Home Assurance Co.*, 640 F.2d 479, 483 (3d Cir. 1981) (holding that in determining whether a party is entitled to indemnification pursuant to an indemnity agreement, "the factual allegations of [the] complaint . . . are

controlling"). A review of the several claims alleged by Pourzal reveal that even if the allegations were true, Pourzal does not allege any conduct on the part of Prime for which Marriott could be held liable and for which Marriott could seek indemnification.

**A. Tortious Interference with Contract: Counts I and II**

Marriott first seeks indemnification from Prime for Counts I and II, the tortious interference with contract claims, in Pourzal's complaint.

To state a claim for tortious interference with contractual relations, a plaintiff must allege that: (1) a contractual relationship existed between the plaintiff and a third party; (2) the defendant knew about the contract; (3) the defendant intentionally and improperly interfered with the contract; (4) the interference was the proximate cause of one party to the contract failing to perform; (5) the defendant intended to harm the plaintiff by interfering with the contract; and (6) the non-performance resulted in harm to the plaintiff. *See Gov't Guar. Fund of Rep. of Finland (Skopbank) v. Hyatt Corp.*, 955 F. Supp. 441, 452 (D.V.I. 1997) (listing the elements of a claim for intentional interference with contract).

Pourzal has alleged that he and Prime had an employment contract. He has alleged that Marriott knew of that contract and proximately caused Prime to breach it. He alleges that

Marriott's actions were wrongful and made for the purpose of harming Pourzal. Pourzal also alleges that Marriott's actions caused him to suffer economic and emotional harm.

However, the indemnity agreement only provides that Prime will indemnify Marriott for Prime's actions or conduct prior to the March 15, 2000, closing. Pourzal's complaint alleges conduct by Marriott, *not Prime*, before the March 15, 2000, closing. Thus, even taken as true, Pourzal's tortious interference with contract allegations do not state conduct that would entitle Marriott to indemnification from Prime. *See In re Tutu Water Wells*, 32 F. Supp. 2d at 798 (holding that a party need only indemnify another against actions that fall within the terms of an indemnity agreement).

**B. Trespass: Count III**

Count III of Pourzal's complaint seeks damages from Marriott for trespass. To state a claim for trespass, a plaintiff must allege that the defendant entered the land of another without the possessor's consent or authorization. Restatement (Second) of Torts § 158 cmt. c.

Count III of Pourzal's complaint alleges that, after March 15, 2000, Marriott used and occupied property owned by Pourzal without his authorization or permission. Pourzal also alleges that Marriott remained on the land and refused to relinquish



control. These allegations state actions taken by *Marriott* after the March 15, 2000, closing. Thus, even taken as true, these allegations state no set of facts which would entitle *Marriott* to indemnification from *Prime*.

**C. Unjust Enrichment: Count IV**

In Count IV of his complaint, *Pourzal* alleges unjust enrichment. To state a claim for unjust enrichment, a plaintiff must allege "that the defendant was enriched, that such enrichment was at the plaintiff's expense and that the circumstances were such that in equity and good conscience the defendant should return the money or property to the plaintiff." *Gov't Guar. Fund*, 955 F. Supp. at 460.

The indemnity agreement affords *Marriott* a defense for conduct taken by *Prime* prior to the closing date. In Count IV of his complaint, *Pourzal* alleges that *Marriott's* trespass, which occurred after March 15, 2000, resulted in *Marriott* being unjustly enriched. Accordingly, even taken as true, Count IV alleges no set of facts that would entitle *Marriott* to indemnification against *Pourzal's* unjust enrichment claim.

**D. Breach of Contract: Counts V and VI**

In Count V of *Pourzal's* complaint, he seeks relief for alleged breaches of contract. To state a claim for breach of contract, a party must allege that: (1) a contract exists; (2)

one party to the contract breached a duty imposed by the contract; and (3) damages resulted from the breach. *See, e.g., Stallworth Timber Co. v. Triad Bldg. Supply*, 968 F. Supp. 279, 282 (D.V.I. App. Div. 1997) (stating the elements of breach of contract claim); *see also* Restatement (Second) of Contracts §§ 235, 237, 240 (stating that a breach of contract occurs when a party does not perform a material duty imposed by a contract).

In Count V of his complaint, Pourzal alleges that he and Marriott entered into a lease agreement on August 4, 2000. Pourzal further alleges that Marriott later breached that lease agreement. The indemnification agreement does not require Prime to defend Marriott against claims based on actions or conduct occurring after the sale of the Reef was finalized on March 15, 2000. Pourzal's claim in Count V of his complaint is based on Marriott's post-closing activities. Thus, even taken as true, Pourzal's allegations in Count V of his complaint state no set of facts for which Prime would be obligated to provide indemnification. *Cf. Jamison v. Ellwood Consol. Water Co.*, 420 F.2d 787, 790 (3d Cir. 1970) (holding that an indemnity clause that clearly covered any and all accidents occurring on a job site covered an accident that occurred due to the negligence that existed prior to the indemnity agreement's existence).

Count VI of Pourzal's complaint against Marriot alleges that

Marriott breached a lease agreement with Pourzal that was entered into on August 27, 2001. This lease allegedly ran from October 1, 2001, through September 30, 2002, and contained a clause extending the lease for sixty-day periods after the original term expired unless and until one party submitted a notice of termination. Both the lease agreement as well as the actions constituting the alleged breach occurred after the March 15, 2000, sale of the Reef. Accordingly, even taken as true, Count VI of Pourzal's complaint alleges no set of facts that would entitle Marriott to indemnification from Prime.

**E. Intentional Misrepresentation: Count VII**

In Count VII, Pourzal alleges that Marriott made intentional misrepresentations to him regarding the Band House and Chef's House leases. To state a claim for fraud, or misrepresentation, Pourzal must allege: (1) that Marriott made a representation of a material fact; (2) knowing the representation to be false when it was made; (3) with the intent that Pourzal would act on the statement; and that (4) Pourzal reasonably relied upon the statement; (5) to his detriment. *In re Tutu Water Wells Contamination Litig.*, 32 F. Supp. 2d 800, 805 (D.V.I. 1998) (citing Restatement (Second) of Torts § 530); Restatement (Second) of Torts § 525.

In Count VII of his complaint, Pourzal alleges that before

entering into the August 4, 2000, lease for Chef's House, Marriott misrepresented to Pourzal that it would enter into long-term lease agreements with Pourzal. Pourzal further alleges that Marriott did not enter into these long-term leases, and that therefore Marriott's earlier representations were false.

The indemnification provisions of the Sale Agreement only provide that Prime will indemnify Marriott for actions arising out of *Prime's actions* or conduct before March 15, 2000. Count VII of Pourzal's complaint alleges actions taken by Marriott prior to March 15, 2000. Thus, even taken as true, Count VII of Pourzal's complaint alleges no set of facts that would entitle Marriott to indemnification from Prime.

**F. Negligent Misrepresentation: Count VIII**

In Count VIII of his complaint, Pourzal alleges that Marriott was negligent with respect to its misrepresentations regarding the Band House and Chef's House leases. To state a claim for negligent misrepresentation, Pourzal must allege that: (1) Marriott made a representation that was false; (2) Marriott should have known the representation was false; (2) Pourzal relied upon the representation Marriott provided; (3) Pourzal suffered pecuniary loss as a result of its justifiable reliance upon the information; and (4) Marriott failed to exercise reasonable care or competence in obtaining or communicating the

information. See *In re Tutu Water*, 32 F. Supp. 2d at 807 (citing Restatement (Second) of Torts § 552). The representation must also be false when it is made. *Charleswell*, 308 F. Supp. 2d at 568 (quoting *L.E.B. Enters., Inc. v. Barclays Bank, P.L.C.*, 33 V.I. 42, 46 (Terr. Ct. 1995)).

As in Count VII of the Complaint, in Count VIII Pourzal alleges that Marriott represented that it would enter into four-year leases with Pourzal for both the Band House and the Chef's House if Pourzal undertook certain actions. Pourzal further alleges that Marriott knew, or that it should have known, that Pourzal would rely on its statements.

The allegations in Count VIII of Pourzal's complaint seek recovery for actions that Marriott, not Prime, took prior to the March 15, 2000, closing. Even taken as true, Count VIII of Pourzal's complaint alleges no set of facts that would entitle Marriott to the indemnification it seeks.

### III. CONCLUSION

Accordingly, for the reasons stated above, this Court will grant Prime's motion to dismiss Marriott's Complaint. An appropriate order follows.

**ENTERED this 18th day of August, 2006.**

**FOR THE COURT:**

\_\_\_\_/s/\_\_\_\_\_  
**Curtis V. Gómez**  
**Chief Judge**

**ATTEST:**  
**WILFREDO MORALES**  
**Clerk of the Court**

**By:**\_\_\_\_\_  
**Deputy Clerk**

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NICK POURZAL, )  
 )  
Plaintiff, )  
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v. ) Civ. No. 2001-140  
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MARRIOTT INTERNATIONAL, INC., )  
CAPITAL HOTEL MANAGEMENT, LLC and )  
BLACKACRE CAPITAL MANAGEMENT, LLC, )  
 )  
Defendants. )  
\_\_\_\_\_ )

MARRIOTT INTERNATIONAL, INC., )  
 )  
Defendant/ )  
Third-Party Plaintiff, )  
 )  
v. )  
 )  
PRIME HOSPITALITY CORP., )  
 )  
Third-Party Defendant. )  
\_\_\_\_\_ )

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*For the defendant Blackacre Capital Management*

**Bennet Chan, Esq.**  
*For the defendant Capital Hotel Management, LLC*

**Maria Tankenson Hodge, Esq.**

*For the third-party defendant Prime Hospitality Corp.*

**ORDER**

**GÓMEZ, Chief J.**

**AND NOW**, for the reasons more fully stated in the Memorandum of even date, it is hereby

**ORDERED** that the motion of Prime Hospitality Corporation ("Prime") to dismiss the third-party complaint by Marriott International, Inc. is **GRANTED**; it is further

**ORDERED** that Prime is dismissed as a party to this action.

**ENTERED** this 18th day of August, 2006.

**FOR THE COURT:**

\_\_\_\_\_/s/\_\_\_\_\_  
**Curtis V. Gómez**  
**Chief Judge**

**Deputy Clerk**

**ATTEST:**  
**WILFREDO MORALES**  
**Clerk of the Court**

**By:**\_\_\_\_\_



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